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[The Benefits And Challenges Of Forum Selection Bylaws](#)

In the past year, a number of companies have amended their bylaws to require that shareholder derivative lawsuits are resolved in the Delaware Chancery Court. This recent spike in the use of company-friendly forum selection clauses comes at a time when lawsuits challenging mergers are rampant. According to Reuters, such lawsuits have tripled from 107 in 2007 to 335 in 2010, despite a decrease in deal volume.

Such forum selection clauses serve a few purposes. First, they prevent companies from having to defend actions in multiple jurisdictions. Often times, shareholders bring derivative lawsuits both in the state where the company is incorporated and where the company is headquartered. Further, a forum selection clause that requires a lawsuit to be resolved by the Delaware Chancery Court takes advantage of Delaware's well-developed body of corporate case law, the Court's expertise in handling these types of cases and its general reluctance to delay or enjoin transactions. These factors can significantly limit the uncertainty and cost associated with a lawsuit and expedite a resolution.

The trend toward forum selection clauses in company bylaws seems to have been inspired by a comment made in dicta by Vice Chancellor Laster in the 2010 case of *In re Revlon, Inc. Shareholders Litigation* where he suggested that a company could effectively mandate a chosen forum for the resolution of shareholder lawsuits, stating that "if boards of directors and stockholders believe that a particular forum would provide an efficient and value-promoting locus for dispute resolution, the corporations are free to respond with charter provisions selecting an exclusive forum for intra-entity disputes." Since the Vice Chancellor's comment, numerous companies have adopted forum selection clauses in their bylaws.

However, companies should be advised that such clauses are a relatively new phenomenon and their enforceability remains uncertain. In fact, only one court has ruled on such a clause and held that it was invalid. In the case of *Galaviz v. Berg*, decided in January 2011, the Federal District Court for the Northern District of California held that a forum selection clause in Oracle Corporation's bylaws was unenforceable against its shareholders. Oracle's Bylaws stated that "the sole and exclusive forum for any actual or purported derivative action brought on behalf of the Corporation shall be the Court of Chancery in the State of Delaware."

In reaching its decision, the *Galaviz* court rejected Oracle's argument that forum selection clauses in

company bylaws should be valid because such clauses are valid in contracts. The district court distinguished between corporate bylaws and contracts, highlighting the ability for bylaws to be unilaterally amended by a company's directors at any time while contracts may not be unilaterally altered after they are entered into. The court emphasized that the forum selection bylaw was adopted after the majority of the alleged wrongdoing by the board had occurred and after the plaintiffs had purchased their shares. Also, the defendants in the case were the same directors that had adopted the forum selection bylaw.

Although the *Galaviz* court found that Oracle's forum selection clause was unenforceable under the facts of the case, it did not suggest that the clause was unconscionable or inherently invalid. It is quite possible that a different result in *Galavis* would have been reached if the bylaws had been adopted by Oracle's stockholders or if the adoption of the forum selection clause had occurred before the alleged wrongdoing or the purchase of shares by the plaintiffs. As this decision is the first of its kind on forum selection bylaws, and many companies have adopted forum selection clauses only in the past year, it will certainly not be the final word on the issue. However, this case provides important insight into the factors a court may consider in enforcing a forum selection bylaw, and offers helpful guidance for companies considering the adoption of one.

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